

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA/ SEATTLE

DANIEL R.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

Case No. 2:23-cv-265-TLF

ORDER REVERSING AND  
REMANDING DEFENDANT'S  
DECISION TO DENY BENEFITS

Plaintiff has brought this matter for judicial review of defendant's denial of his application for disability insurance benefits ("DIB").

The parties have consented to have this matter heard by the undersigned Magistrate Judge. 28 U.S.C. § 636(c); Federal Rule of Civil Procedure 73; Local Rule MJR 13.

I. ISSUE FOR REVIEW

Whether the ALJ Properly Evaluated Plaintiff's Subjective Testimony.

II. BACKGROUND

Plaintiff filed an application for DIB in February 2020, alleging an onset date of August 6, 2019. AR 74–75, 90–91. Plaintiff's application was denied initially and on reconsideration. AR 88, 105. Administrative Law Judge ("ALJ") Lawrence Lee held a hearing on September 9, 2021 (AR 43–72) and issued a decision on November 1, 2021

1 finding plaintiff not disabled. AR 12–42. Plaintiff now seeks judicial review of the ALJ’s  
2 decision.

### 3 III. STANDARD OF REVIEW

4 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s  
5 denial of Social Security benefits if the ALJ’s findings are based on legal error or not  
6 supported by substantial evidence in the record as a whole. *Revels v. Berryhill*, 874  
7 F.3d 648, 654 (9th Cir. 2017) (internal citations omitted). Substantial evidence is “such  
8 relevant evidence as a reasonable mind might accept as adequate to support a  
9 conclusion.” *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (internal citations  
10 omitted).

### 11 IV. DISCUSSION

12 In this case, the ALJ found plaintiff has the following severe impairments: post-  
13 traumatic stress disorder; anxiety; depression; cognitive disorder; obesity; irritable bowel  
14 syndrome; osteoarthritis of the knees; diabetes mellitus; and asthma. AR 18. After  
15 evaluating plaintiff’s testimony and the medical evidence, the ALJ assessed that plaintiff  
16 has the residual functional capacity (“RFC”), in relevant part, to perform light work and  
17 that “[t]he bathroom should be available within one to two minutes.” AR 22.

#### 18 Whether the ALJ Properly Evaluated Plaintiff’s Subjective Symptom Testimony

19 The ALJ’s determinations regarding a claimant’s statements about limitations  
20 “must be supported by specific, cogent reasons.” *Reddick v. Chater*, 157 F.3d 715, 722  
21 (9th Cir. 1998) (citing *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990)). In  
22 assessing a plaintiff’s credibility, the ALJ must determine whether plaintiff has presented  
23 objective medical evidence of an underlying impairment. If such evidence is present and  
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1 there is no evidence of malingering, the ALJ can only reject plaintiff's testimony  
2 regarding the severity of his symptoms for specific, clear and convincing reasons.  
3 *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citing *Lingenfelter v. Astrue*, 504  
4 F.3d 1028, 1036 (9th Cir. 2007)). "The standard isn't whether our court is convinced, but  
5 instead whether the ALJ's rationale is clear enough that it has the power to convince."  
6 *Smartt v. Kijakazi*, 53 F.4th 489, 499 (9th Cir. 2022).

7 Plaintiff testified he developed irritable bowel syndrome ("IBS") after undergoing  
8 stomach surgery in 2016. AR 56. He explained that on average, he goes to the  
9 bathroom eight to 10 times a day.<sup>1</sup> *Id.* Plaintiff contends the ALJ did not properly  
10 address his testimony. Dkt. 9 at 1–10. Plaintiff also contends that by failing to properly  
11 address his testimony, the ALJ erred in assessing his RFC. *Id.* at 10–13.

12 Reading the ALJ's entire decision, the ALJ did not disregard plaintiff's testimony,  
13 as plaintiff alleges. The ALJ stated he was discounting plaintiff's testimony generally,  
14 explaining he found plaintiff's "statements concerning the intensity, persistence and  
15 limiting effects of [his] symptoms... not entirely consistent with the medical evidence  
16 and other evidence in the record." AR 24.

17 The ALJ then specifically cited treatment notes concerning plaintiff's abdominal  
18 pain and reports about frequent bowel movements and explained, "Given these  
19 gastrointestinal issues, the undersigned has limited the claimant having availability to a  
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21 <sup>1</sup> Plaintiff also testified to other symptoms but challenges only the ALJ's evaluation of his IBS. Dkt. 9. The  
22 Court will not consider matters that are not "specifically and distinctly" argued in the plaintiff's opening  
23 brief. *Carmickle v. Commissioner, Social Sec. Admin.*, 533 F.3d 1155, 1161 n. 2 (9th Cir. 2008) (quoting  
24 *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1164 (9th Cir. 2003)). The Court will therefore  
25 only consider the ALJ's evaluation of this portion of plaintiff's testimony.

1 bathroom within one to two minutes away and indoor work.” AR 26. That the ALJ  
2 acknowledged plaintiff’s IBS, cited records purporting to show improvement with his  
3 symptoms, and proposed a limitation addressing those symptoms show the ALJ  
4 considered and discounted—but did not disregard—plaintiff’s testimony.

5 And yet, in discounting plaintiff’s testimony based on improvement from  
6 treatment, the ALJ erred. While symptom improvement is a valid reason to consider, 20  
7 C.F.R. § 404.1529(c)(3), the ALJ’s reasoning was not supported by substantial  
8 evidence.

9 The ALJ pointed out that in 2019, plaintiff was prescribed medication for  
10 abdominal pain following stomach surgery. AR 26 (citing AR 2239). The records  
11 indicate plaintiff’s abdominal pain is “associated” with the urge to have a bowel  
12 movement, but plaintiff’s physician found no definitive cause for his abdominal pain. See  
13 AR 2097, 2239. But records also show that the following year, plaintiff’s symptoms were  
14 “unchanged,” and he continued to have approximately seven bowel movements each  
15 day. AR 2096. Plaintiff’s physician noted that even with his medication, his IBS  
16 symptoms were “hard to manage.” AR 2099.

17 Plaintiff’s physician also noted his IBS as “further complicated by significant  
18 mental health disease, including depression and PTSD,” further indicating that his  
19 condition did not improve from treatment. See *id.* The ALJ pointed out that plaintiff’s  
20 physician instructed him to increase his medication as needed, but the record does not  
21 show whether dosage change led to improvement. See AR 26 (citing AR 2099).

22 The ALJ also generally discounted plaintiff’s testimony based on his activities of  
23 daily living. An ALJ may discount a claimant’s symptom testimony when it is  
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1 inconsistent with the claimant's general activity level. See *Molina v. Astrue*, 674 F.3d  
2 1104, 1112–13 (9th Cir. 2012); *Lingenfelter v. Astrue*, 504 F.3d 1028, 1040 (9th Cir.  
3 2007). Here, the ALJ cited plaintiff's ability to drive, complete house chores, and spend  
4 time with family. AR 29. However, the record does not show, and the ALJ did not make  
5 clear, whether plaintiff was able to do these activities without interruption from his  
6 symptoms. As the ALJ did not explain how these activities would necessarily be  
7 inconsistent with plaintiff's testimony about his IBS symptoms and need to use the  
8 bathroom multiple times, the ALJ erred in discounting plaintiff's testimony.

9 In sum, the Court disagrees with plaintiff's argument that the ALJ disregarded  
10 plaintiff's testimony, given the ALJ provided reasons to discount his statements. But the  
11 ALJ erred by discounting plaintiff's testimony when there was not substantial evidence  
12 to support the ALJ's reasons, and this error affected plaintiff's RFC, the Court agrees  
13 the ALJ's RFC assessment is not supported by substantial evidence. *Valentine v.*  
14 *Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 690 (9th Cir. 2009) ("an RFC that fails to take  
15 into account a claimant's limitations is defective").

16 Plaintiff also contends that based on the ALJ's erroneous RFC assessment, the  
17 Court must remand for an award of benefits. Dkt. 9 at 14–16. Plaintiff points to the ALJ's  
18 assessment that he would need one to two minutes to go to the bathroom and explains  
19 that if his testimony about needing to use the bathroom eight to 10 times each day were  
20 credited as true, he would spend 20 to 40 minutes *going* to the bathroom. *Id.* at 4–8.  
21 Further, plaintiff argues, if his time *using* the bathroom was also considered, he would  
22 be off task for at least 45 minutes. See *id.* Plaintiff contends this means he is unable to  
23 work because during the hearing, the vocational expert testified that being off task for  
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1 45 minutes in total throughout the day would be job preclusive. *See id.*; AR 69. Plaintiff  
2 misconstrues the “credit-as-true” analysis.

3 When deciding whether to remand for an award of benefits, the Court must first  
4 determine whether the ALJ has failed to provide legally sufficient reasons for rejecting  
5 evidence. *Leon v. Berryhill*, 880 F.3d 1041, 1044 (9th Cir. 2017) (citing *Garrison v.*  
6 *Colvin*, 759 F.3d 995, 1014–20 (9th Cir. 2014)). Second, the Court must determine  
7 “whether the record has been fully developed, whether there are outstanding issues that  
8 must be resolved before a determination of disability can be made, and whether further  
9 administrative proceedings would be useful.” *Treichler v. Comm’r of Soc. Sec. Admin.*,  
10 775 F.3d 1090, 1101 (9th Cir. 2014) (internal citations and quotation marks omitted).  
11 Only if the first two steps are satisfied can the Court determine whether, “if the  
12 improperly discredited evidence were credited as true, the ALJ would be required to find  
13 the claimant disabled on remand.” *Garrison*, 759 F.3d at 1020. Further, “[e]ven if [the  
14 Court] reach[es] the third step and credits [the improperly rejected evidence] as true, it  
15 is within the court’s discretion either to make a direct award of benefits or to remand for  
16 further proceedings.” *Leon*, 880 F.3d at 1045 (citing *Treichler*, 773 F.3d at 1101).

17 The first step is met here because the ALJ failed to provide a valid reason,  
18 supported by substantial evidence, to discount plaintiff’s testimony. However, the issue  
19 of how a proper evaluation of plaintiff’s testimony might have impacted plaintiff’s RFC—  
20 including the ALJ’s finding that plaintiff needs one to two minutes to go the bathroom—  
21 and how much time it takes for plaintiff to use the bathroom, and how that time affects  
22 his ability to work, is an ambiguity in the record, and these are issues the ALJ must  
23 resolve. When such outstanding issues remain, the Court “cannot deem the erroneously  
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disregarded testimony to be true; rather, the court must remand for further proceedings.” *Dominguez v. Colvin*, 808 F.3d 403, 409 (9th Cir. 2015).

CONCLUSION

Based on the foregoing discussion, the Court concludes the ALJ improperly determined plaintiff to be not disabled. Therefore, the ALJ’s decision is reversed and remanded for further administrative proceedings. On remand, the ALJ must re-evaluate plaintiff’s testimony regarding his IBS, reassess plaintiff’s RFC, and proceed with the rest of the sequential evaluation process. The ALJ may allow plaintiff to provide additional testimony and evidence, as necessary to clarify the record.

Dated this 28th day of February, 2024.



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Theresa L. Fricke  
United States Magistrate Judge